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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1595

AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION, AMERICAN INTERNATIONAL UNDERWRITERS MEDITERRANEAN, INC., MIDDLE EAST ASSURANCE AND REASSURANCE COMPANY, S.A.L., FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY AND AMERICAN LIFE INSURANCE COMPANY,

Petitioners,

vs.

FRANK WILLE, Superintendent of Banks of the State of New York, and United States of America,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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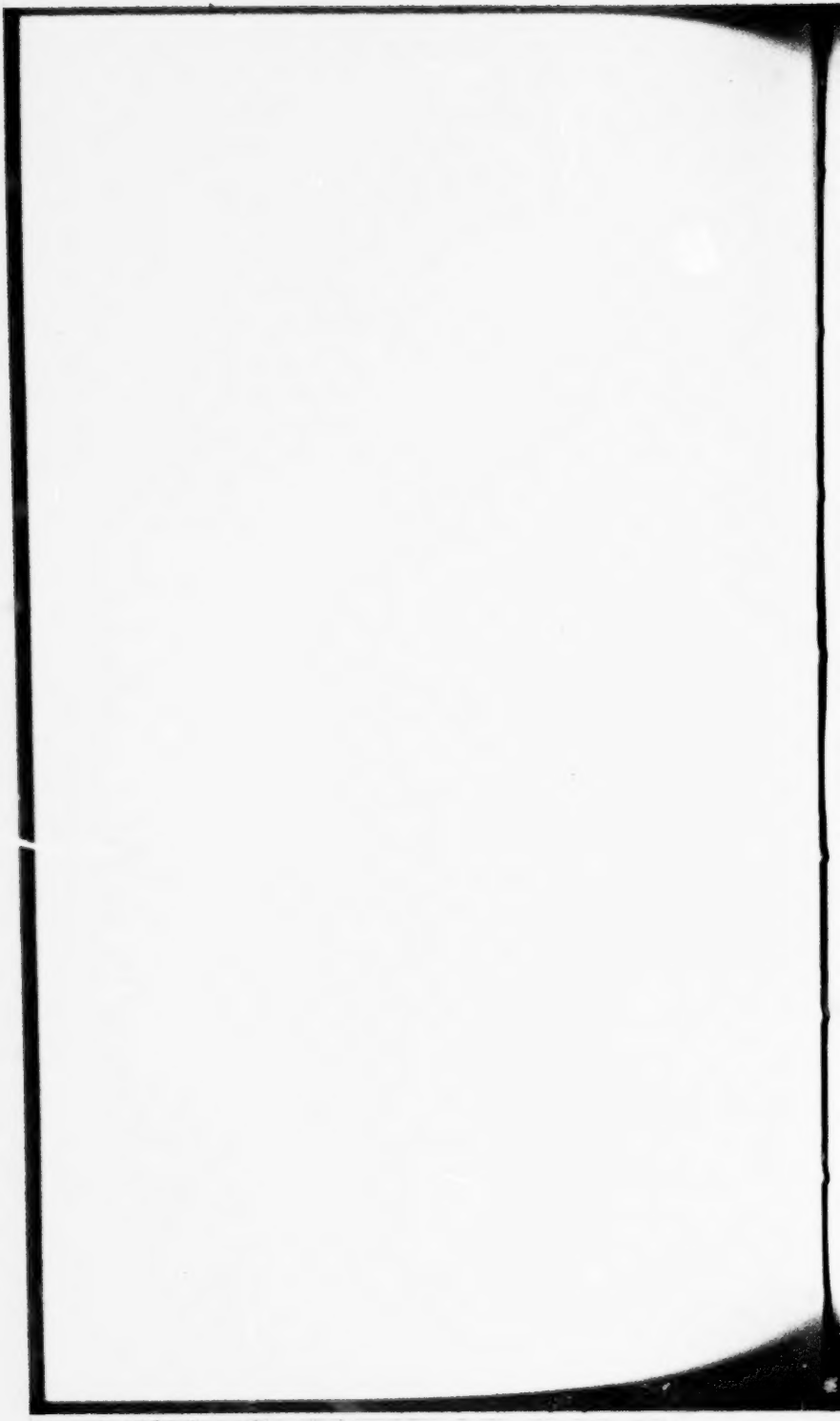

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled proceeding on October 30, 1969; a motion for reargument was denied on February 19, 1970.

Opinions Below

No opinions were written by the Court of Appeals of the State of New York or the Appellate Division, First Department. The decision of the Court of Appeals affirming, without opinion, the judgment of the Appellate Division is reported in 25 N.Y. 2d 619; the decision of the Court of Appeals denying reargument and amending its remittitur is not yet reported; the decision of the Appellate Division, First Department, affirming, without opinion, the orders of the Supreme Court of the State of New York, County of New York, is reported in 31 App. Div. 2d 721; the opinions of the Supreme Court of the State of New York, County of New York, are reported in 308 N.Y.S. 2d 520 (not officially reported).

Jurisdiction

The judgment of the Court of Appeals was entered on October 30, 1969 and a motion for reargument was denied by the Court of Appeals on February 19, 1970. A motion to amend the remittitur of the Court of Appeals to set forth the Constitutional question determined against the petitioners was granted by the Court of Appeals on February 19, 1970.

The material required to be appended to the petition under Rule 23 of this Court is printed in the appendix to the petition in this Court captioned, "INTRA BANK, S.A., Petitioner, vs. FRANK WILLE, Superintendent of Banks of the State of New York, and United States of America, Respondents," Docket No. 1584. The material is not reprinted here. Appendix references, therefore, are to the appendix to the petition of INTRA BANK, S.A. which arises from the

identical N. Y. case. The certified record in the New York courts was also filed with the Intra Bank petition.

The jurisdiction of this Court is involked under 28 U.S.C. §1257 (3).

Question Presented

Following the closing of the Beirut head office of Intra Bank, S.A., the Superintendent of Banks of the State of New York took over the assets of its New York branch (IBNY) and subsequently determined to liquidate the branch. After initially rejecting the claim of the Commodity Credit Corporation (CCC) the Superintendent reversed himself and entered into a compromise agreement with the CCC recognizing it as a New York creditor. The reason advanced by the Superintendent for the compromise was the possibility that the CCC might be entitled to a federal priority to all the IBNY assets under 31 U.S.C. §191. The net effect of the compromise is to grant a preference to CCC. dispose of all the assets of IBNY and deprive petitioners, who are attaching non-New York creditors, and other general creditors of an opportunity to share in the large surplus of assets in IBNY.

The New York Courts approved the compromise on the basis of hearsay affidavits and incomplete, inconclusive documentation over the objections of these petitioners and other parties, who sought discovery and an evidentiary hearing.

In these circumstances were petitioners deprived of due process of law under the Fifth and Fourteenth Amendments to the U.S. Constitution by the judicial confirmation of the compromise where:

a) the record before the New York Courts was incomcomplete and unreliable;

b) though incomplete, the record indicated (1) that the CCC has no federal priority because there was no debt due or certain to become due to the CCC and no evidence that Intra was insolvent and (2) its claim as a New York creditor is uncertain;

c) the petitioners were denied the opportunity to develop reliable evidence through discovery proceedings and a plenary evidentiary hearing.

Constitutional Provisions and Statutes Involved

Relevant constitutional and statutory provisions are set forth in Intra Bank Appendix B, pp. 55a-89a.

Statement

This review is sought from an order of the Supreme Court of the State of New York, County of New York, entered on June 24, 1968 [R. 16] granting the motion of the Superintendent of Banks of the State of New York (Superintendent) for approval of a compromise agreement with the CCC under which the previously rejected claim of the CCC was recognized as that of a preferred New York creditor of the New York branch of Intra Bank, S.A. (IBNY) and from an order on reargument entered on September 17, 1968 [R. 14], adhering to the original decision. The Appellate Division of the Supreme Court, First Department, affirmed the two orders of the lower court, without opinion, but granted leave to appeal to the Court of Appeals of the State of New York [R. 522, 526; 31 A.D. 2d 721]. The New York Court of Appeals affirmed the Appellate Division, without opinion, on October 30, 1969. On February 19, 1970 the New York Court of Appeals denied a motion for reargument but granted a motion to

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amend the remittitur of the Court of Appeals to read as follows:

> "Upon the appeal herein, there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of appellants under the Fifth and Fourteenth Amendments were denied. Appellants argued that the failure to hold a plenary hearing denied them due process of law. The Court of Appeals considered this contention and held that, on this record, the failure to order a plenary hearing did not deny due process of law to appellants."

Petitioners' demand for discovery proceedings and for an evidentiary hearing was raised in its answer to the petition in the lower court and on oral argument. Thus, the answer to the petition [R. 244-246] recites in part as follows:

. . .

> 6. The aforesaid Petition discloses no legal grounds upon which the Superintendent of Banks, even in the exercise of discretion, may recognize the claim of the Commodity Credit Corporation, particularly as a creditor against the New York branch of Intra Bank, S.A.
>
> 7. Respondents are attaching creditors of Intra Bank, S.A., at least, and are entitled to priority to assets of the New York branch of Intra Bank, S.A. in excess of that owed to New York creditors of Intra Bank.
>
> 8. Upon information and belief, the Superintendent of Banks of the State of New York has no standing to enter into a compromise of this nature, particularly since he has no evidence whatsoever that the claim of the Commodity Credit Corporation is valid, and if

valid, is entitled to recognition as that of a New York creditor under the Banking Law of the State of New York.

. . .

WHEREFORE, Respondents pray that the Petition be denied and that this counterclaim be granted to the extent that the Superintendent of Banks and the Commodity Credit Corporation be required to submit to disclosure, pursuant to Article 31 of the Civil Practice Laws and Rules, and to demonstrate therein the merits of the Commodity Credit Corporation's claim.

The affidavit of Peter J. Malloy, Jr. [R. 247-251], dated March 26, 1968, submitted in opposition to the Superintendent's petition, states in part as follows:

. . .

6. In his Petition the Superintendent of Banks asks this Court to approve compromise of the CCC claim without setting forth one iota of evidence that the claim of the CCC is valid. The Superintendent merely asserts that the claim arises ". . . from complicated international transactions involving—in addition to CCC, Intra Bank and Intra Bank New York—exporters in the United States, importers in Lebanon, brokers, middlemen, carriers, banks in Lebanon and in the United States, and others. Petitioner and the United States of America have differing views as to the characterization and legal ramifications of various aspects of these complex transactions. . . ." (Petition, paragraph 8) This is an incredible, if not insulting, basis upon which to ask this Court to act with respect to the proposed compromise.

. . .

9. Deponent is sure that many more questions will develop as the details of these "complicated international transactions" are divulged. This Court and the Respondents, whose claims will be wiped out by the proposed compromise, have the right to know the details of the CCC claim so as to evaluate the claim on the basis of fact, rather than conjecture.

WHEREFORE, deponent prays that the Petition be denied pending completion of disclosure proceedings to determine the details of the CCC claim.

A further request for discovery was made by counsel for the petitioners in oral argument before the lower court [R. 31]. These points were again raised in their briefs in the Appellate Division and the New York Court of Appeals.

(a) ***The Claim of Petitioners American International Underwriters Corporation, et al.***

These petitioners (Insurers) are United States corporations or are foreign corporations owned substantially by United States interests. All are in the insurance business and are creditors of Intra Bank, S.A., a Lebanese banking corporation. Their claims are primarily based on deposits with Intra Bank S.A. made in accordance with the statutes of various countries as a condition for doing an insurance business.

In mid-October, 1966 Intra Bank, S.A. (Intra Beirut) closed its doors and on October 15, 1966 the Superintendent took possession of its property in N.Y. State, which consisted mainly of the assets of IBNY and the 680 Fifth Avenue Corp. On October 26, 1968, pursuant to orders of attachment issued in actions commenced by three of the Insurers in Supreme Court, New York County, the Sheriff

levied upon IBNY and 680 Fifth Avenue Corp. Additional levies were made subsequently by the Sheriff pursuant to other orders of attachment in actions commenced by the two remaining Insurers. [R. 247] The Superintendent moved to vacate the levies of attachment, but in each case the attachments were upheld as valid as to the excess over amounts owing to those creditors of IBNY whose claims are preferred under §606(4)(a) of the New York Banking Law. [R. 252-6]

By reason of their attachments Insurers have established a priority right to the assets of Intra in New York in excess of the amounts owed to preferred New York creditors. They are most interested, therefore, in insuring that claims recognized by the Superintendent (1) are claims arising out of transactions with IBNY and entitled to preference under Banking Law §606(4)(a) and (2) are valid, enforceable claims. Insurers contend that on the record before the lower Court the subject claim of the CCC is neither entitled to preference nor valid.

(b) *Proceedings in the Lower Court.*

There was no testimony taken in the lower Court prior to approval of the Superintendent's proposed compromise agreement. The record consists entirely of affidavits and oral argument by attorneys having no personal knowledge of the complex transactions, supplemented by bare documentation, which clearly must be incomplete.

A special proceeding was commenced by order to show cause dated February 16, 1968, [R. 41] and verified petition of the Superintendent of the same date [R. 49] for approval of the subject compromise with the CCC.

The petition states that, after taking possession of Intra Bank on October 15, 1966, the Superintendent determined

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to liquidate its affairs.[1] On July 18, 1967 the CCC filed its claim with the Superintendent in the amount of $21,010,766, the principal amount of 53 letters of credit allegedly issued by IBNY. The sole details in the Petition of the CCC's claim are set forth in paragraph 8 thereof, which states in part:

> "The claim alleged by USA arises from complicated international transactions involving—in addition to CCC, Intra Bank and IBNY,—exporters in the United States, importers in Lebanon, brokers, middlemen, carriers, banks in Lebanon and in the United States, and others. Petitioner and USA have differing views as to the characterization and legal ramifications of various aspects of these complex transactions . . ."[2] [R. 50]

On August 9, 1967, according to the Petition, the Superintendent rejected the CCC claim.

On February 1, 1968, the Superintendent entered into an agreement of compromise with the CCC whereby the previous rejection of the CCC's claim against IBNY was to be withdrawn and the claim accepted subject to priority to be afforded all other IBNY creditors whose claims had been accepted by the Superintendent as preferred under §606(4)(a) of the New York Banking Law.

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[1] Since IBNY was at all times *solvent,* [R. 52-7; 93] and the home office, Intra Bank, S.A., was in the process of reorganization which culminated in the Beirut Agreement and Protocol of October 11, 1967, [R. 217] an initial question exists as to the propriety of the Superintendent's precipitous action in determining to liquidate IBNY. There is no proof that either IBNY or its parent were ever insolvent.

[2] Neither the Superintendent nor his Special Counsel ever advised the Court of the particulars of their differing view of the transactions. Only the view of the USA (CCC) was stressed.

By this compromise agreement the surplus over amounts owed to recognized IBNY preferred creditors is wiped out, since the CCC claim exceeds the amount of IBNY's remaining assets. [R. 59] The net result is to deprive other American creditors of Intra, *e.g.* the Insurers, of any possibility of obtaining satisfaction of any part of their claims in New York.

Aside from reducing administrative and litigation expenses, the Superintendent asserts in favor of the compromise that it compensates in full creditors of Intra recognized as preferred under §606 (4)(a) of the New York Banking Law whose claims might be dissipated if CCC were recognized, after litigation, as entitled to all IBNY assets pursuant to an asserted federal priority under 31 USC §191. The Superintendent also cites his reliance upon the opinion of his Special Counsel, Messrs. Hughes, Hubbard, Blair & Reed. However, at the hearing held on March 27, 1968 Francis Reed, Esq., a partner in this New York law firm, stated, enigmatically in view of his recommendations, but nevertheless emphatically:

> ". . . By offering this compromise, your Honor, the Superintendent does not surrender his position. *I still think we could win the case, if we tried it.*" [R. 33] (Emphasis added).

By verified answer sworn to on March 26, 1968 [R. 244] Insurers generally denied on information and belief the allegations of the Superintendent's Petition and counterclaimed under Article 78 CPLR alleging that the proposed compromise was an abuse of discretion and seeking, at least, the right to disclosure under Article 31 CPLR to ascertain the merits of the CCC claim. [R. 244]

On March 27, 1968 a hearing was held before Justice Hecht at which attorneys for the various parties engaged in oral argument. [R. 19-40] No testimony was taken. Numerous affidavits were submitted to the lower Court in support of or in opposition to the compromise, but none of the deponents indicated any personal knowledge of the involved transactions upon which the claim of the CCC was based. *Of particular note is the complete lack of any statement, sworn or unsworn, of an official of the CCC.*

(c) *The Claim of the CCC.*

The claim of CCC is based on amounts allegedly due under 53 letters of credit issued by IBNY in connection with the financing of commodity shipments to Lebanon, primarily grain. The letters of credit authorize the CCC to draw *for the account* of designated United States exporters. The drafts drawn upon the letters of credit, however, were required to be accompanied by a statement certifying that the amount due was not received within 36 months after delivery of the commodity. The letters further provide that the drafts would only be honored after a specified date to occur about 36 months after issuance of the letters of credit. [e.g. R. 257] None of the dates specified in the letters of credit had been reached on the date the Superintendent took possession of IBNY and the date specified in only one letter of credit, No. 184, in the sum of $113,286.44, had occurred prior to the last date for filing proofs of claim in the Superintendent's liquidation proceeding, July 20, 1967. A draft [R. 111] drawn by the CCC under letter No. 184 and dated March 23, 1967, was presented to the Superintendent and returned. [R. 113] The draft, however, was not accompanied by the certificate of non-payment required by the letter of credit.

None of the 53 letters of credit appeared, as even contingent liabilities, on the books of IBNY, which was subject to the jurisdiction of the New York State Department of Banking. [R. 89]

The transactions of which the 53 letters of credit were a part were exceedingly complex. The only detailed attempt at explanation of these transactions in the record below was made by Gary J. Strum, Esq., First Assistant Counsel of the New York State Banking Department, in his affidavits of April 17, 1968 and May 31, 1968. [R. 267 *et seq.*] At best, this was an effort to reconstruct events by an attorney without personal knowledge based on such records as were found at IBNY when the Superintendent took possession. Mr. Strum admitted that the records in his possession were incomplete, since they contained nothing with respect to dealings between CCC, Lebano-American Commodity & Supply Corp. (LACS) and the American exporters. [Par. 11, R. 275]

Based on the Strum affidavits and two documents submitted without further elaboration by the Assistant United States Attorney on June 14, 1968 [R. 434], the lower Court in its opinion [R. 493] described what it assumed to be a typical transaction:

1. An American exporter submitted an application to the CCC for credit in the required amount for shipment of a certain quantity of wheat to Lebanon for payment in 36 months, payment to be guaranteed by an irrevocable letter of credit issued by a qualified United States bank.[3]

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[3] In the sample credit application there is nothing to show compliance with the criteria set forth in the then existing CCC regulations GSM-3, Revision II, 7 C.F.R. §1488.3, for extension of credit beyond the normal six to twelve months to the maximum period allowed of 36 months. This is one indication that there was an overall agreement of some sort between CCC and Lebanese interests

2. The application was approved by the General Sales Manager for the CCC.

3. Lebano-American Commodity & Supply Corp. (LACS) instructed IBNY to designate the American exporter as the supplier of the commodities covered by letters of credit drawn in favor of IBNY by a Lebanese bank (never Intra Beirut) on behalf of a Lebanese miller and confirmed by United States banks.[4]

4. On or about the time of receipt of the LACS instructions IBNY received the irrevocable letters of credit from the United States banks covering the shipment. These letters of credit were of the usual commercial type. IBNY then wrote to the American exporter designating it as supplier and agreeing (a) to remit to the exporter its handling charges and freight; and (b) to establish a letter of credit in favor of CCC *for the account* of the exporter for the amount indicated, provided that the exporter submitted the documents required by the United States banks' letters of credit.

5. Upon receipt of documents from the American exporter IBNY transmitted them to the United States banks

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(LACS, *et al.*), not disclosed in the record below, which included a provision for extension of the maximum period of credit.

[4] In its opinion the Court below clearly erred in stating that IBNY received these orders from the Lebanese miller. [R. 494, par. 3] In each instance IBNY received instructions for designating the American exporter from LACS [R. 279, *e.g.*] which apparently acted as middleman and, in some way, as agent for the CCC in developing Lebanese markets for United States commodities and arranging credit terms and rebates for Lebanese importers. LACS is also shown as the purchaser of the commodity shipments in the American exporter's invoice [R. 295]. There is nothing in the record which establishes the relationship between CCC and LACS, a factor which is crucial in determining the validity of the CCC's claim.

and received in exchange credits from the United States banks in the full amount of their letters of credit. IBNY then disbursed to the exporter the amount due to it for freight and handling charges and credited the balance to the account of Intra Beirut.

6. IBNY then notified Intra Beirut of the credit to its account and received in reply authorization from Intra Beirut to establish its letter of credit in favor of CCC for the account of the American exporter.

7. Only after shipment of the goods, as shown by the shipping documents submitted by the exporter, and receipt of specific authorization from Intra Beirut, IBNY issued its letter of credit to the CCC in the form previously described.

8. Intra Beirut apparently deposited the credits received from IBNY from this transaction to the account of LACS in Intra Beirut. LACS, in turn, apparently used the credits in the account to generate profits which were used to finance rebates to the Lebanese millers and to compensate LACS and Intra Beirut for their services. This was concededly done with the knowledge and consent of CCC. [R. 470]

The logical explanation of these complex procedures is this:

The American exporter sold the commodities shipments to LACS, not the Lebanese millers who in turn purchased the shipments from LACS. The debts arising from the initial sales, therefore, were owed to the exporters by LACS and the IBNY guaranty letters of credit were opened on behalf of LACS. The funds received by IBNY through the United States banks from the Lebanese millers were the proceeds of the resales of the shipments by LACS

to the Lebanese millers and these funds belonged to LACS, which had 36 months within which to pay the American exporters with interest at 5%. The lower Court, however, presumed that these funds passing through IBNY represented the proceeds of the sales by the exporters and that neither the exporters nor CCC could look to the purchasers, which the Court mistakenly believed to be the Lebanese millers, since payment had already been made to IBNY. [R. 499] The purchaser from the American exporter in each case, however, was LACS. See excerpts from Cooper Bros. Audit, R. 325 and particularly par. 355, R. 326.

The record indicates that no attempt was ever made by the CCC or the exporter to recover from LACS, the primary debtor.

REASONS FOR GRANTING THE WRIT

I.

The Claim of the CCC Is Invalid as a Preferred Claim Under New York Banking Law §606(4)(a) and as a Priority Claim Under 31 USC §191.

Preference is accorded under the New York Banking Law in the subject liquidation proceeding only to those creditors whose claims arise out of transactions with the New York branch of a foreign banking corporation. Such claims are not preferred unless they would represent an enforceable legal obligation against the New York branch if such branch were a separate and independent legal entity. New York Banking Law § 606(4)(a). Claims of creditors other than those preferred under the statute are of no concern to the Superintendent. New York Banking Law § 606(4)(b).

The approval of the lower Court of the proposed compromise was based on a finding that the claim of the CCC was probably valid as a claim against IBNY in the liquidation proceeding and entitled to priority as a claim of the United States under 31 U.S.C. § 191 on two theories [R. 476]:

1. Restitution;

2. A mature cause of action under the 53 letters of credit.

Principal reliance was placed on the theory of restitution, which, as demonstrated below, is wholly inapplicable.

(a) ***There Was No Showing of Inequitable Conduct by IBNY or any Other Party to the Transaction and, Therefore, No Duty of Restitution.***

In its opinion on reargument the lower Court succinctly stated the major premise for its decision in favor of the compromise, a premise to which it devoted the greatest part of its original opinion:

> "The claim of CCC does not depend on its rights as holder of the letters of credit. It has a claim for restitution, based on the fact that Intra NY has procured money 'under such circumstances that in equity and good conscience [it] ought not to retain it' (*Pink* v. *Title Guar. & Trust Co.*, 274 N. Y. 167, 173), and which Intra NY 'is obliged by natural justice and equity to refund' (*Bayne* v. *United States*, 93 U. S. 642, 643). That debt becomes subject to CCC's statutory priority (see *Bayne*). CCC may sue directly on the debt without recourse to the letters of credit (*First Nat. Bank* v. *Mott Iron Works*, 258 U. S. 240, 241)." [R. 476]

The inequitable conduct of IBNY, according to the lower Court, was its failure to turn over the funds received from the Lebanese millers to the American exporter or the CCC. On analysis this conclusion is untenable.

The CCC extended credit to the American exporters for 36 months at 5% interest. This was in accordance with authority granted CCC to "(a) Support the prices of agricultural commodities through loans, purchases, payments, and other operations; . . . (d) Remove and dispose of or aid in the removal or disposition of surplus agricultural commodities; . . . (f) Export or cause to be exported, or aid in the development of foreign markets for, agricultural commodities; . . ." 15 U.S.C. § 714c.

In the conduct of its business the CCC was authorized to make necessary loans and advances of its funds. 15 U.S.C. § 714b (1).

The statute and Regulations issued by the Secretary of Agriculture contemplate that the American exporters would extend similar credit terms to foreign purchasers. For example, one of the criteria in the Regulations for approving credit periods up to the maximum of 36 months was to "(1) Permit United States exporters to meet credit terms offered by competitors from other Free World countries." 7 C.F.R. § 1488.3(c).

In the subject transactions the purchaser in each case was LACS, which received 36 months' credit from the exporter and agreed to pay interest at 5%. It was, therefore, on behalf of LACS that IBNY issued its guaranty letters of credit, subject to the conditions expressed therein, to CCC *for the account* of the American exporter. The funds which passed through IBNY were the proceeds of the resale of the commodities by LACS to Lebanese millers. These resales were distinct from the initial sale by the American exporter to LACS and the proceeds belonged to LACS. These proceeds were used by LACS to generate income with which to finance rebates to the Lebanese millers in accordance with the CCC objective of making the price of United States commodities competitive in Lebanon.[5] This was done with the knowledge and consent of the CCC and probably in accordance with an overall agreement between it and LACS which is not revealed in the record.

It is submitted that the lower Court's finding in favor of restitution was based on a misapprehension of the in-

[5] The lower Court's conclusion [R. 481] that only "a small fraction" of the proceeds were needed by LACS to finance the refunds is, of course, erroneous. LACS needed the entire amount to invest in order to generate sufficient income.

adequate record before it. As far as can be determined from that record, there was no inequitable conduct by IBNY and no duty of restitution.

(b) *There Was No Debt Due or Certain to Become Due to CCC Under the IBNY Letters of Credit.*

The IBNY letters of credit were issued as a guaranty and must be applied in accordance with their terms and conditions. The letters provided (1) that drafts drawn pursuant to the credit must be accompanied by a written statement of CCC that the amount due for the commodities was not received within 36 months of the delivery date and (2) that drafts would not be honored if presented earlier than 36 months after delivery. They also specified that the amount of the credit would be reduced by the amount of any credits or payments received by CCC for the account of the American exporter. [R. 277]

The 36 month period had not expired under any of the letters at the time the Superintendent took possession on October 15, 1966. Claims which are contingent on the date that the Superintendent takes possession of a bank are not entitled to share in the bank's assets. See, *e.g., Varick Spring Corp.* v. *The Bank of United States,* 264 N.Y. 297 (1934). October 15, 1966 is also the time of insolvency, if any, at which the existence of a debt to the United States must be determined under 31 U.S.C. §191.

Any obligation by IBNY under the letters could not mature until after October 15, 1966. Further, at any time after October 15, 1966 the claims of the CCC, as an arm of the United States, were subject to defeasance by payment for the account of the American exporter. The lower court, again erroneously, found to the contrary, reasoning:

"... Assuming, *arguendo,* that the claim of the letters of credit had not accelerated on the date of the liquida-

> tion order, and had therefore not matured at that time, there is no question but that they were indefeasible obligations which would have to be paid by Intra NY on the stated maturity date.
>
> As already pointed out, Intra NY was the sole obligor, since payment could not be claimed from either the Lebanese millers, who had already made payment, nor from ADM [the exporter], who had never received payment. Objectants emphasize the recital in the letters that CCC would consent 'to a reduction in the amount of this credit to the extent that CCC applies in satisfaction of the bank's obligation hereunder any payments or credits received for the account of [ADM].' But it is clear that CCC would not receive payments or credits from any other source, since such payments had already been made to Intra NY." [R. 509]

As noted above, LACS, the purchaser of the commodities, was the primary obligor, not the Lebanese millers. IBNY was required to pay, subject to the conditions of its letters of credit, only if LACS did not pay. Therefore, at the time the Superintendent took possession there was another party to whom the CCC and American exporter could look for payment and the claim was not certain to become payable by IBNY. Since the claim was " . . . wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency . . ." they are not debts due at the time of insolvency under the priority statute, 31 U.S.C. §191. *Massachusetts* v. *United States*, 333 U.S. 611, 627 (1948); nor are they recognizable in the subject liquidation proceeding. *Varick Spring Corp., supra.*

(c) *In Any Case, the Claim of CCC Was Acquired From the American Exporter After the Alleged Insolvency and Is Not Entitled to Priority Under 31 U.S.C. §191.*

The debt arising from the sale of the commodities was owed by LACS to the American exporter, *not* to CCC. The IBNY letters of credit were, therefore, issued on behalf of LACS to guarantee LACS' repayment of the debt to the American exporter. Thus, the letters of credit specified that they guaranteed payment to CCC, not for CCC's own account, but *for the account of the American exporter.* There was no obligation running directly from IBNY to CCC.

The Regulations in effect during the subject transactions clearly demonstrate this conclusion. The exporter, under GSM-3 §1488.8 [R. 333], was required to repay its loan from the CCC in an amount equivalent to any early payments received by the exporter from the foreign importer on the debt arising from the sale. Section 1488.16 [R. 336] deals with assignment by the exporter of his claim against the importer. If the CCC rather than the American exporter held the claim, this provision would be meaningless. Therefore, any claim of the CCC is derived, by assignment or otherwise, from the American exporter upon non-payment by the purchaser at the expiration of the 36 month credit period. Such a transfer of debt to the CCC after insolvency cannot give rise to a priority under 31 U.S.C. §191. The CCC has no greater rights than the original creditor. *Engleman* v. *Commodity Credit Corp.*, 107 F. Supp. 930 (S.D. Cal., 1952); *United States* v. *Marxen*, 307 U.S. 200 (1939).

(d) *Subsequently, CCC Changed Its Regulations in an Attempt to Secure Its Priority Under 31 U.S.C. §191.*

Following the Intra affair CCC changed its Regulations. The amendments serve two purposes—(1) they add, for clarification, definitions of terms used in the old and new Regulations and (2) *they change the legal nature of the sales transactions so as to avoid the loss of federal priority under 31 U.S. §191 which occurred in the Intra case.*

Present GSM-4, §1488.2 adds the following definitions of "foreign importer" and "account receivable";

"(k) 'Foreign importer' or 'importer' means *the foreign buyer who purchases from the exporter* the commodities exported under a financing agreement and *who executes the instruments or other documents evidencing the account receivable assigned to CCC.*" (Emphasis added)

"(n) 'Account receivable' means the *contractual obligation of the foreign importer to the exporter for the portion of the port value of the commodity exported for which the exporter is extending credit to the importer.* The account receivable shall be evidenced by a promissory note or accepted draft in form and substance satisfactory to CCC, except that it may be evidenced by other documents, in form and substance satisfactory to CCC, evidencing the contractual obligation of the foreign importer when the account receivable is assured by an obligation issued by a U.S. bank or when the Vice President, CCC, or his designee, determines under special circumstances that it is in the interest of CCC. All such notes, accepted drafts and other documents evidencing the account receivable shall provide for (1) payment in U.S.

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dollars in the United States, (2) interest in accordance with §1488.6, and (3) acceleration of payment thereunder in accordance with the terms and conditions of GSM- (4). As used in GSM-4, 'instrument' means a promissory note or accepted draft."

These definitions confirm that the purchase price of the commodities is owed by the importer (here, LACS) to the American exporter and that it is the American exporter, not CCC, who extends credit to the importer.

Present §1488.9(a) lists the documents required to be submitted to the CCC within 45 days after export of the commodities. One of these documents is:

"(2) An assignment of the account receivable arising from the export sale, in form and substance acceptable to CCC. When the account receivable is evidenced by documents other than instruments, in accordance with §1488.2(n), such documents shall be submitted with the assignment."

This added provision completely changes the debtor-creditor relation arising from the sale since now, after assignment, the debt is owed to the CCC by the importer. There was no such requirement in the Regulations in force during the period of the subject sales to LACS. The purpose of the amendment is, of course, to make CCC the creditor so as to acquire a priority under 31 U.S.C. §191 in the event that the debtor later becomes insolvent. Such a priority did not arise in the subject transactions because at the time of any insolvency the debt ran to the American exporter who was not entitled to priority.

Subsection (7) of present §1488.9(a) also adds a requirement that accounts receivable become immediately due and

payable in the event of the importer's insolvency. There was no such provision in force at the times relevant to this case.[6]

The amended Regulations, in addition, drastically change the requirements for acceptable bank obligations (*i.e.*, letters of credit). Section 1488.9(a)(6) now requires the exporter to provide:

> "(6) A bank obligation or obligations in accordance with §1488.4, paragraphs (d) and (e) of this section, and §1488.11, payable to CCC, in form and substance acceptable to CCC, covering the financing agreement and including interest in accordance with §1488.6."

Paragraph (e) of §1488.9 reads:

> "(e) If for any reason a draft drawn under a foreign bank obligation is dishonored or if the issuing bank is insolvent, is in bankruptcy, receivership, or liquidation, has made an assignment for the benefit of creditors, or for any other reason discontinues or suspends payments to depositors or creditors or otherwise ceases to operate on an unrestricted basis, the obligation issued by that bank to CCC shall become immediately due and payable, and any balance due on the account receivable assured by the obligation issued by such bank shall, at the option of CCC, become immediately due and payable. CCC may permit the substitution of another acceptable foreign bank obligation covering such balance due and confirmed in accordance with §1488.4."

There was no provision for acceleration in the Regulations in force at the relevant times or in the 53 letters of credit.

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[6] There is no evidence in the present case that the importer-debtor, LACS, ever became insolvent.

Absent acceleration, the obligations of IBNY, which in any case ran to the exporter, remained contingent.

II.

In the case of *Protective Committee* v. *Anderson,* 390 US 414, 424 (1968) this Court set forth the due process standard of fairness required for a judicial confirmation of a compromise where the rights of those not party to the compromise agreement are involved:

> "... There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated ..."

The lower court [R. 490] recognized this standard but did not comply with it. It is clear that the lower court and the New York Appellate Courts did not have before them all relevant facts—they merely had an incomplete record composed mainly of hearsay, speculation and a hodgepodge of documents unexplained by any party to the complex transactions with knowledge. This led the New York Courts to misinterpret the mechanics of the transactions, the relationships of the parties and the legal and equitable effects of their conduct.

Due process requires that petitioners and other creditors of Intra Bank be permitted to conduct discovery proceedings and to have an evidentiary hearing so as to develop the facts necessary for the court to make a reasonable appraisal of the compromise agreement.

CONCLUSION

The New York Courts were misled by the inadequate record and concluded, erroneously, that there was a substantial probability that the CCC could prevail in establishing a priority to the assets of IBNY in the event of litigation and that this justified the compromise agreement. Analysis of this record, however, shows that, on the contrary, it is unlikely that the CCC has a federal priority and that full disclosure of the facts will demonstrate that the CCC is in no better position than other general creditors of Intra Bank. To affirm the compromise on the present record without discovery and a plenary hearing will grant the CCC an inequitable disadvantage and deprive other creditors of Intra Bank of property without due process.

Dated: New York, N. Y.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1584

INTRA BANK, S.A.,

Petitioner,

v.

WILLIAM T. DENTZER, JR., Superintendent of Banks of the State of New York, and United States of America,

Respondents;

and

No. 1595

AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION, et al.,

Petitioners,

v.

WILLIAM T. DENTZER, JR., Superintendent of Banks of the State of New York, and United States of America,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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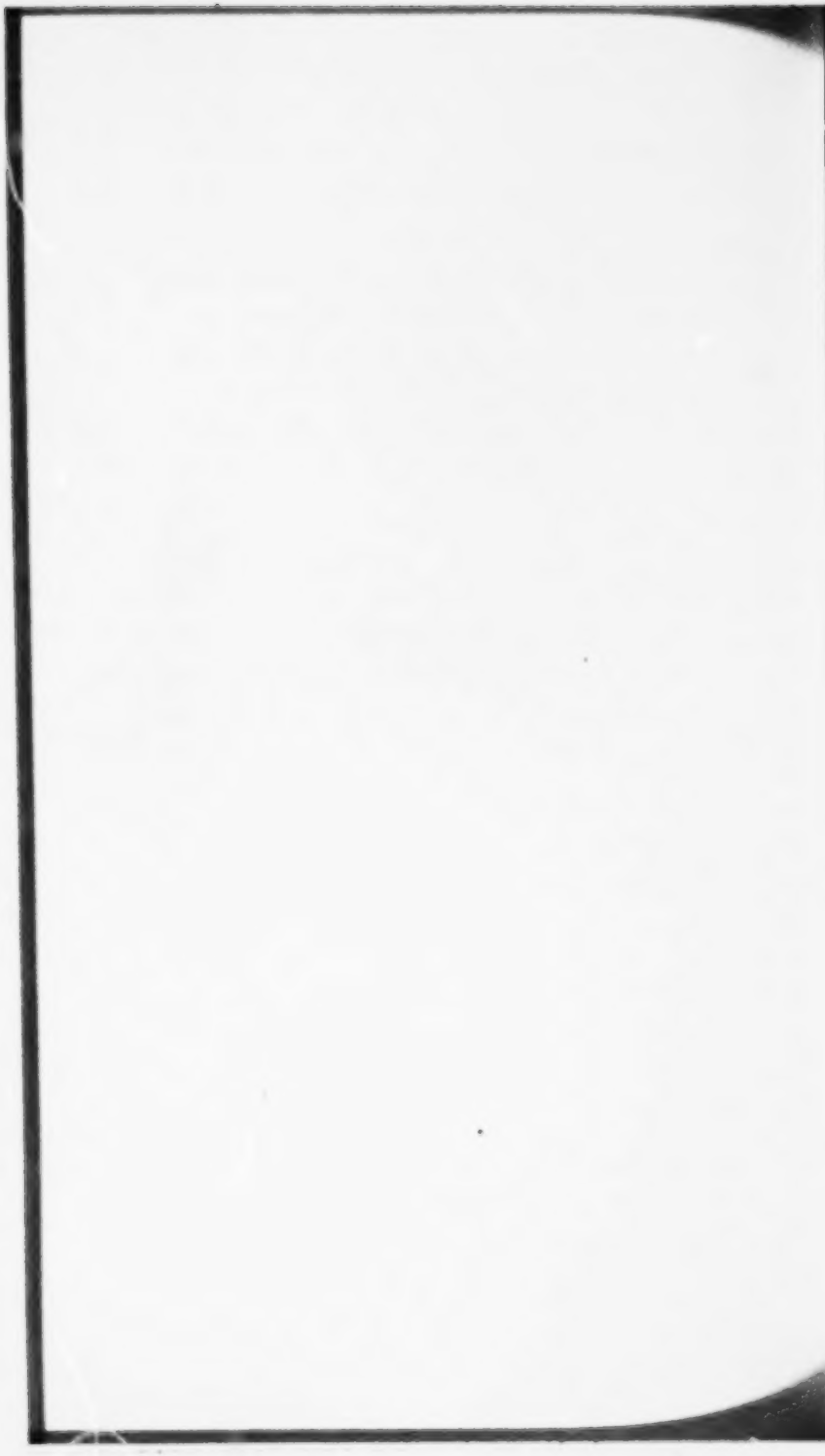

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BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Question Presented

Whether the proceedings below upon which the courts of the State of New York approved the compromise of a claim in the liquidation of a New York bank denied petitioners due process.

Statement

Pursuant to his statutory duty and authority, William T. Dentzer, Jr., the Superintendent of Banks of the State

of New York (Superintendent Dentzer and his predecessor as Superintendent of Banks, Frank Wille, are hereafter referred to as "Superintendent") is engaged in the liquidation of the New York branch of a Lebanese bank* which closed its doors over three and a half years ago. Acting pursuant to §606 of the New York Banking Law, the Superintendent took possession of Intra Bank's business and property in New York on October 15, 1966. Although §607 gave Intra Bank the right to contest the Superintendent's action, no such litigation was filed. Under §606 the Superintendent thus acquired title to, and the duty to marshal, all of IBNY's business and property wherever located, and all of Intra Bank's business and property located in New York. Accordingly the Superintendent commenced a variety of actions against various IBNY and Intra Bank debtors (R55-7)**; he also initiated litigation to clear his title to an office building located at 680 Fifth Avenue in New York City (R 54).†

Out of the assets thus collected, the Superintendent is directed to pay the claims of depositors and creditors of IBNY. He is specifically forbidden to pay any claim by Intra Bank or any of its other branches or subsidiaries, or of anyone else whose claim would not be an enforceable legal obligation against IBNY if it were a separate and independent legal entity.†† If, but only if, all depositors

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* The New York branch will be referred to as "IBNY". The home office in Lebanon will be referred to as "Intra Bank".

** References are to the record on appeal in the New York Court of Appeals.

† In 1968 the Superintendent sold the building for approximately $15,250,000 subject to valid mortgages of approximately $5.3 million.

†† Claims of depositors and creditors of IBNY are referred to in §606 of the Banking Law as "preferred" claims. In a sense the term "preferred" is misleading because "preferred" claims are the only claims the Superintendent can recognize at all. Accordingly, we shall refer to "preferred" claimants as "depositors and creditors of IBNY".

and creditors of IBNY have been paid in full together with statutory interest, any surplus after the payment of expenses is to be made available to the home office or its domiciliary liquidator.

After he had finally determined to liquidate IBNY, the Superintendent set in motion the statutory machinery for the filing of claims (Banking Law, §§ 620-25). The total of all claims timely filed plus the accounts payable on IBNY's books was slightly over $32 million, including a claim of over $21 million filed by the Commodity Credit Corporation ("CCC") (R 53, 71) based on 53 so-called letters of credit issued by IBNY.

The Superintendent included CCC's claim in the list of claims filed by him in his office and in the office of the Clerk of New York County as required by §622 of the Banking Law.* The 646 claims filed and the 447 accounts payable were individually examined; the Superintendent accepted claims and accounts totalling approximately $900,000 and rejected the remainder, including CCC's claim. Of the rejected claims, almost $4 million were abandoned; the remainder became the subject of litigation pursuant to §625 of the Banking Law (R 433).

Thus, the valid claims together with those currently in litigation amount to something over $6.5 million (R 433).** The assets in the Superintendent's possession which were cash or cash equivalents at December 31, 1969 came to approximately $12.2 million.

The statutes which control the liquidation are, of course, a part of a comprehensive scheme of regulations enacted

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* Under §623 of the Banking Law any interested party, including petitioners here, might have objected to CCC's claim. None did so (R 51).

** A substantial portion of the claims in litigation represent no more than alleged set-offs against actions commenced by the Superintendent to collect assets.

by the State of New York with respect to local banks and local branches of foreign banks within its jurisdiction. It is axiomatic that the very purpose of bank regulation is the protection of local depositors and not the protection of shareholders or the foreign home offices of local branches. The statutory scheme of liquidation under which the Superintendent must operate makes it plain that his primary obligation is to look out for the rights of the New York depositors and creditors who dealt with IBNY in reliance upon the license he granted and the regulations he administers.

It is undisputed that if the CCC's claim were to be sustained in litigation, the depositors and creditors of IBNY would be wiped out entirely. Upon advice of counsel, the Superintendent rejected the CCC's claim and entered into protracted discussions with the CCC which ripened into negotiations looking toward a compromise (R 57). The result was the Agreement of Compromise which has now been reviewed and unanimously approved by thirteen judges of three New York courts.

So far as the Superintendent is concerned, the essential feature of the Compromise is that all depositors and creditors of IBNY are to be paid in full before the CCC is paid anything (R 67-8). In return, the Superintendent will assign to the CCC certain causes of action he has asserted in the course of marshalling assets. The Agreement of Compromise was formally executed between the Superintendent and the United States (acting for its agency the CCC) as of February 1, 1968. On February 16 the Superintendent petitioned Special Term of the New York Supreme Court to approve the Compromise and obtained an order to show cause why it should not be approved, which was returnable at a hearing held on March 27, 1968 (R 48). Elaborate provisions for service of the order were

provided and complied with and a number of objectants, including petitioners Intra Bank and the Insurers,* filed papers and appeared in opposition to the approval of the Compromise.

Neither Intra Bank nor the Insurers made or could make any assertion that its objection to the proposed Compromise stems from any status as a depositor or creditor of IBNY. Petitioner Intra Bank asserted prejudice from the Compromise on the ground that the CCC's claim is so large that its acceptance makes it clear, as it probably does, that there will be no surplus to be made available to the home office. Petitioners the Insurers asserted that they are creditors of the home office of Intra Bank or other Intra Bank branches (not IBNY), with the added feature that they obtained attachments upon any surplus remaining after liquidation "after being returned to defendant [Intra Bank] or such other person as a court may designate as provided in Chapter XIII of the Banking Law" (R 83-4).

Thus it is apparent that the real adversaries here are the depositors and creditors of IBNY on the one hand, and Intra Bank and those claiming through it on the other. Final approval of the Compromise means that the depositors and creditors of IBNY will be paid in full. Its disapproval would create a risk that the CCC could establish its claim and that the other depositors and creditors of IBNY would be paid nothing.** In essence, petitioners seek to require the Superintendent to take an unnecessary gamble with the rights of parties whom the New York statute directs him to prefer.

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* The "Insurers" collectively includes American International Underwriters Corporation, American International Underwriters Mediterranean, Inc., Middle East Assurance and Reassurance Company, S.A.L., Firemen's Insurance Company of Newark, New Jersey and American Life Insurance Company.

** Unlike depositors in most American banks, depositors in IBNY and other local branches of foreign banks are not insured by the Federal Deposit Insurance Corporation.

At the hearing in Special Term various objectants requested discovery and thereafter the Superintendent submitted a lengthy affidavit with exhibits showing in great detail a typical transaction involved in the CCC's claim (R 267-337). Thereafter, in response to a suggestion that the transaction might not have been typical, the Superintendent submitted a further lengthy affidavit with exhibits dealing with substantially all of the transactions (R 338-433) and the United States also submitted an affidavit (R 434-7).

The first opinion of Special Term approving the Compromise was issued on June 12, 1968. Thereafter, Intra Bank moved for reargument and submitted additional affidavits, which came into the record without objection (R 462-6). The second opinion of Special Term approving the Compromise was issued September 17, 1968. After the matter was fully briefed and argued, the approval was unanimously affirmed by the Appellate Division, First Department on December 17, 1968. Leave to appeal was obtained on March 6, 1969 but the appeal was perfected too late to be heard until the fall. Again after full briefs and oral argument, the New York Court of Appeals unanimously affirmed on October 30, 1969. A few days before expiration of the time to file a petition in this Court for a writ of certiorari, Intra Bank applied for reargument and to amend the remittitur. On February 19, 1970 the Court of Appeals denied reargument and amended the remittitur as follows:

> "Upon the appeal herein, there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Whether the rights of appellants under the Fifth and Fourteenth Amendments were denied. Appellants argued that the failure to hold a plenary hearing denied them due process of law. The Court of Appeals considered this contention and held that, on this record, the failure to order a plenary hearing did not deny due process of law to appellants."

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ARGUMENT

The petitions should be denied for want of a substantial Federal question.

In its motion in the New York Court of Appeals to amend the remittitur and its Brief in support thereof (reprinted in pertinent part in the Appendix to this brief), petitioner Intra Bank sought to interject into the case a number of Federal questions. In this endeavor it was unsuccessful, and the only Federal question available for review is that actually referred to by the Court of Appeals in the amended remittitur—the procedural adequacy of the proceedings in Special Term upon which the Compromise was judicially approved.

Because the reasons for granting the writ advanced by both petitioners dwell so extensively on matters unrelated to the Federal question, we submit the following preliminary comments before addressing ourselves to that Federal question:

First, for obvious reasons it is inappropriate for the Superintendent to argue the strength of the CCC's claim upon the merits. As it was in the New York courts, that subject shall be left to the attention of the brief filed on behalf of the United States. It is sufficient for the Superintendent to say that the CCC's claim obviously presents complex, novel and sharply contested legal issues.

Second, as they did in the New York courts, petitioners approach this matter as though it involved an adverse judgment upon the merits of the controversy between the Superintendent and the CCC. It involved no such thing. The following language from *Florida Trailer and Equipment Company* v. *Deal*, 284 F 2d 567 (5th Cir. 1960), makes the point:

> "This appeal really presents the question whether there was such an abuse of discretion in the Ref-

eree's approval of a proposed settlement that the District Court erred in not setting it aside. We emphasize *really* because the Objecting Creditor (now appellant) in the hearing before the Referee, on the petition of review in the District Court and again here in briefs and arguments, persists in treating the matter as though this were an appeal from a decision on the intrinsic merits in an initial adversary proceeding. The two are quite different." (Emphasis in original).

• • •

"[T]he approval of a proposed settlement does not depend on establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. *But the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise.* This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise." (284 F 2d at 568, 571) (Emphasis added).

Third, this proceeding arose upon the petition of the Superintendent of Banks of the State of New York for approval by a New York court of a compromise made in the course of the liquidation of a New York bank which existed and was regulated solely by virtue of the New York Banking Law. The Compromise was of a controversy between himself and a claimant to assets in his possession. The mere fact that the claimant happens to be an agency

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of the Federal Government does not, of course, mean that judicial approval of the Compromise determines any Federal question. And even if the controversy necessarily involved a Federal question*, still judicial approval of its compromise does not determine any Federal question.

With this background, we turn to the only Federal question here involved.

The proceedings below fully satisfy due process.

The standard used by Special Term in considering the Agreement of Comprise was set forth recently in *Protective Committee* v. *Anderson,* 390 U. S. 414 (1968), which reversed a prior approval of a compromise.** There the Court said, as quoted by Special Term (R 488-9):

> "Compromises are 'a normal part of the process of reorganization.' *Case* v. *Los Angeles Lumber Prods. Co. Ltd.,* 308 U. S. 106, 130 (1939). In administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts. At the same time, however, it is essential that every important determination in reorganization proceedings receive the 'informed, independent judgment' of the bankruptcy court. *National Surety Co.* v. *Coriell,* 289 U. S. 426, 436 (1933) * * * There can be no informed and independent judgment as to whether a proposed

* A judgment on the merits in favor of the CCC's claim might be supported on alternative State grounds. A judgment on the merits against the CCC's claim would probably involve a Federal question.

** The *Anderson* case involved two separate questions. The first was the propriety of certain agreements whereby the trustee compromised the claims of, and his counterclaims against, an alleged creditor. The second question was whether a reorganization proposed by the Trustee was fair and equitable. In the case at bar the Superintendent is engaged in a liquidation, not a reorganization, hence the second point in *Anderson* is not here involved.

> compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation." (390 U. S. at 424-5).

As to the propriety of the compromise involved in *Anderson,* this Court reversed because:

> "The record before us leaves us completely uniformed as to whether the trial court ever evaluated the merits of the causes of actions held by the debtor, the prospects and problems of litigating those claims, or the fairness of the terms of compromise. More than this, the record is devoid of facts which would have permitted a reasoned judgment that the claims of actions should be settled in this fashion." (390 U. S. at 440-1).

Here an experienced and careful Justice at Special Term has specifically stated that (R 490):

> "The court 'has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated * * * to the end that a true appraisal be made of [CCC's] chances of success upon the issues presented, and a correlative conclusion drawn as to the fairness and reasonableness of the proposed compromise.'"

Although we do not suggest that the record here is all that would be required for a full and final determination

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on the merits of the controversy between the Superintendent and the CCC, the authorities cited above make it clear that avoidance of the expense and hazards of making such a record is a good part of the policy of the law which favors compromises. Nevertheless, there is a record here, encompassing almost 500 pages exclusive of opinions below, which contains in very considerable detail the basic facts upon which the controversy is based.

There is no substance to petitioners' claims that they were improperly denied a plenary hearing or discovery. With respect to the hearing, the Superintendent brought on his petition for approval of the Agreement of Compromise by order to show cause. In their responses to such petition, neither Intra Bank nor the Insurers made any request for a plenary or evidentiary hearing (R. 95-8; 244-6). In its initial and formal objection to the Agreement of Compromise, Chase Manhattan Bank ("CMB")* did request a "full evidentiary hearing". However, there was no specification of the matters to be dealt with at such a hearing and CMB made no offer of proof.

At the hearing on the order to show cause held in Special Term on March 27, 1968, CMB made no mention of any further hearing; petitioners Intra Bank and the Insurers also remained entirely silent on the subject. In the months following the hearing the parties, including the Superintendent, CCC and Intra Bank, submitted the evidence which makes up the record upon which Special Term approved the Agreement of Compromise. At no time did CMB suggest to Special Term that such record

* CMB pursued its objection to the New York Court of Appeals. However, it did not seek reargument or to amend the remittitur there. Statements under Rule 21 of this Court by petitioners Intra Bank and the Insurers state that CMB has no further interest in this proceeding. Petitioner Intra Bank attributes such lack of interest to the asserted fact that CMB "has settled or is about to settle" its dispute with the Superintendent and the United States. Such attribution is entirely inaccurate.

was inadequate or make any further request for additional hearings.

It was not until after Special Term's initial decision approving the Compromise that petitioner Intra Bank, in its motion for reargument and rehearing (R 439), made a request for any further hearings. Petitioners the Insurers never made any such request of Special Term. At no time did anyone objecting to the Compromise tender any witness or make any offer of proof.

With respect to discovery, prior to and during the hearing on March 27, 1968, petitioners Intra Bank and the Insurers indicated a desire for discovery (R 29-31; 101-06; 250-1). In response thereto the Superintendent submitted two lengthy affidavits with attached exhibits (R 267-337; 338-433) which disclosed in great detail the transactions upon which the CCC's claim is based; the Superintendent further stated (in his Memorandum in Reply to Objections, served on petitioners on April 19, 1968) that if any objectant required further discovery he would have no objection to such discovery on a basis supervised by the Court. After this offer petitioners made no further request for discovery in Special Term. However, CCC thereafter submitted an affidavit with exhibit (R 434-7) and, following the motion for reargument and rehearing, CCC submitted a further affidavit with exhibit (R 467-74).

But beyond all of this, the record (R 267-337) makes it perfectly clear that petitioner Intra Bank had in its possession full information about the transactions on which CCC's claim is based and about whatever the relations might have been between Intra Bank and the other Lebanese parties to the transactions. It had the fullest possible opportunity to present any evidence it desired to Special Term, and indeed continued to present evidence without objection upon its motion for reargument and rehearing (R 442-9 *passim;* 452-61; 463-6).

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Petitioners the Insurers still are not able to identify any issue upon which they wish to present evidence or have a hearing. Petitioner Intra Bank now suggests four such issues (Intra Bank Petition, pp. 13-14), only the last two of which require comment.

As to the question of Intra Bank's insolvency, the record contains a flat and undisputed admission by Intra Bank, ratified by the judgment of a Lebanese court, that its capital has been "totally lost" (R 219, 461). This is a perfectly sound definition of balance sheet insolvency, and Intra Bank proffers no evidence to rebut it.

As to the question of the Beirut Protocol, petitioner Intra Bank was permitted to put into evidence, without objection, whatever evidence it has to support its bizarre interpretation of that agreement (R 442-9; 452-66). There is no suggestion as to what might be added at any further hearing. The short answer to petitioner Intra Bank's argument on the Beirut Protocol is that, if Intra Bank is aggrieved by any alleged breach of the agreement by CCC, its proper remedy is to sue the CCC for any damages occasioned by such breach. The only cases it cites are the gold clause cases, *Perry* v. *United States,* 294 U. S. 330 (1935) and *Nortz* v. *United States,* 294 U. S. 317 (1935) which stand simply for the proposition that, under certain circumstances, CCC might be liable for breach of contract as though it were a private party.

Thus, petitioners have had the fullest opportunity to present evidence, have had extensive discovery, and declined by silence an invitation for further discovery before the record was closed in Special Term. In these circumstances, the Federal question belatedly tendered by petitioners is without substance.

Conclusion

The depositors and creditors of IBNY have been waiting for over three and one half years for the money due them. The Superintendent has the money to pay them, and the

Agreement of Compromise pursuant to which he can pay them is already over two years old. The controversy between the CCC and the Superintendent which is settled by the Agreement of Compromise involves many difficult and novel questions which were thoroughly considered by the Superintendent before he agreed to settle. Under the settlement the depositors and creditors of IBNY are fully protected and petitioner Intra Bank is thus relieved of its debts to a whole class of its creditors. On its part, the United States gives up its claim to a substantial amount of money to which it stoutly maintains it is entitled under the law.

The opinions of Special Term manifest a careful and detailed consideration of all of the issues and arguments involved, and all the consequences of the litigation which would follow disapproval of the Agreement of Compromise. Special Term's determination has been reviewed and unanimously affirmed by the Appellate Division, First Department and by the Court of Appeals.

The writ should be denied.

Respectfully submitted,

New York, New York
May 29, 1970

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APPENDIX

Notice of Motion for Reargument and to Amend Remittitur

Court of Appeals

STATE OF NEW YORK

IN THE MATTER OF THE PETITION

of

FRANK WILLE, as Superintendent of Banks of the State of New York, for approval, pursuant to § 618(1) of the New York Banking Law, of the Agreement of Compromise between petitioner and the Commodity Credit Corporation, an agency and instrumentality of the United States of America.

INTRA BANK, S.A., AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION, AMERICAN INTERNATIONAL UNDERWRITERS MEDITERRANEAN, INC., MIDDLE EAST ASSURANCE AND REASSURANCE COMPANY S.A.L., FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, AMERICAN LIFE INSURANCE COMPANY and THE CHASE MANHATTAN BANK (National Association),

Respondents-Appellants,

against

FRANK WILLE, Superintendent of Banks of the State of New York,
Petitioner-Respondent,

and

UNITED STATES OF AMERICA
Respondent-Respondent,

and

MIDDLE EAST AIRLINES and PEHLE, REIMER, LUXFORD & NAIDEN,

Respondents.

Court of Appeals

STATE OF NEW YORK

IN THE MATTER OF THE PETITION

of

FRANK WILLE, as Superintendent of Banks of the State of New York, for approval, pursuant to § 618(1) of the New York Banking Law, of the Agreement of Compromise between petitioner and the Commodity Credit Corporation, an agency and instrumentality of the United States of America.

INTRA BANK, S.A., AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION, AMERICAN INTERNATIONAL UNDERWRITERS MEDITERRANEAN, INC., MIDDLE EAST ASSURANCE AND REASSURANCE COMPANY S.A.L., FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, AMERICAN LIFE INSURANCE COMPANY and THE CHASE MANHATTAN BANK (National Association),

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UNITED STATES OF AMERICA
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MIDDLE EAST AIRLINES and PEHLE, REIMER, LUXFORD & NAIDEN,
Respondents.

BRIEF OF APPELLANT INTRA BANK, S.A.

• • •

The Remittitur should be Recalled and Amended

Intra contended in its brief and on oral argument that under 31 U.S.C. Section 191 and the law of the United States as laid down by the Supreme Court in *Massachusetts v. United States*, 333 U. S. 625 (1948), that the CCC had no conceivable claim to which it was entitled to priority, and hence had nothing to compromise.

The Supreme Court expressly rejected Intra's contention. However, if Intra's contention is correct, then the orders of the Courts below should have been reversed by this Court. Necessarily then, this Court decided that question adversely to Intra. Accordingly, the remittitur should be amended to provide that this federal question was presented to, and necessarily decided adversely to Intra by this Court.

Intra contended that inasmuch as CCC's claim was predicated on express contracts, as matter of federal law (*U. S. v. Marxen*, 307 U. S. 200 (1938), no claim for restitution or in quantum meruit could be considered as a basis for the settlement. The Supreme Court rejected Intra's contention (498-9).

It may be that this Court did not approve the Supreme Court's reliance on a restitution theory in order to approve the compromise. However it seems perfectly clear that the CCC had no claim, provable or otherwise, under the letters of credit. Accordingly, this federal question was presented and may necessarily have been decided adversely to Intra by this Court. So as to remove any doubt of the rationale of this Court's affirmance of the order appealed from it is respectfully suggested that the remittitur be amended to provide that this question was presented and passed upon adversely to Intra.

Intra contended that the application of Section 191 rested upon proof of balance sheet insolvency. It is true that the Supreme Court concluded that Intra was insolvent. On the state of this record there is no evidence to support that conclusion. It may be therefore, that this Court ruled that insolvency is not a predicate for the application of Section 191. If this be so, we request that the remittitur be amended to include a provision that Intra presented to this Court the question of whether insolvency was a necessary predicate for the application of Section 191 and that this Court decided such question adversely to Intra.

Intra contended that the compromise constituted an unconstitutional breach by the United States of the Beirut Protocol. If this Court had agreed with Intra's contention it would necessarily have had to reverse the order appealed from. Accordingly, such constitutional and federal question was presented and this Court necessarily decided it adversely to Intra. The remittitur should therefore be amended in that respect.

Conclusion

Reargument should be granted and on reargument the order appealed from should be reversed, pre-trial discovery should be directed, and a full-scale trial on the issue of the settlement should be directed to be held before the Court or an official referee.

In the alternative the remittitur should be recalled and amended as requested by Intra.

Respectfully submitted,

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386-564—70

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1584

INTRA BANK, S.A., PETITIONER

v.

WILLIAM T. DENTZER, JR., SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, AND UNITED STATES OF AMERICA

No. 1595

AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION, ET AL., PETITIONERS

v.

WILLIAM T. DENTZER, JR., SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT UNITED STATES OF AMERICA IN OPPOSITION

OPINIONS BELOW

The opinions of the Supreme Court of the State of New York, New York County, of June 12, 1968 (App. 26a–54a)[1] and of September 16, 1968 (App. 15a–25a)

[1] The reference "App." is to the appendix to Intra Bank's petition for a writ of certiorari, No. 1584.

are unofficially reported in 308 N.Y.S. 2d 520. The Appellate Division, First Department, affirmed without opinion (App. 15a), 31 App. Div. 2d 721, as did the Court of Appeals of the State of New York (App. 6a), 25 N.Y. 2d 619. The Court of Appeals' order granting an amendment of the remittitur (App. 1a-2a) is reported in 26 N.Y. 2d 831.

JURISDICTION

The New York Court of Appeals entered its order of affirmance on October 30, 1969 (App. 6a), and a timely motion for reargument was denied on February 19, 1970 (App. 1a). The petitions for writs of certiorari were filed on May 18 and on May 20, 1970, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether approval by the courts of the State of New York, under § 618(1) of the New York Banking Law, of a compromise of a claim by the United States, against assets being held by the Superintendent of Banks in the liquidation of a New York branch of a foreign bank, was rendered on the basis of an informed and independent judgment by the State courts as to whether the compromise was fair and equitable.

STATUTES INVOLVED

Section 5 of the Act of March 3, 1797, c. 20, 1 Stat. 515, as amended (31 U.S.C. 191), provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the exe-

> cutors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

Section 4(e) of the Commodity Credit Corporation Charter Act of June 29, 1948, c. 704, 62 Stat. 1070, as amended (15 U.S.C. 714b(e)), provides:

> The Corporation—
>
> Shall have all the rights, privileges, and immunities of the United States with respect to the right to priority of payment with respect to debts due from insolvent, deceased, or bankrupt debtors. The Corporation may assert such rights, privileges, and immunities in any suit, action, or proceeding.

Sections 606 and 618 of the New York Banking Law are reproduced in the appendix to petition No. 1584, pp. 83a–88a.

STATEMENT

Petitioner in No. 1584 is a Lebanese banking corporation ("Intra Bank") which, until October 14, 1966, was licensed by the New York Superintendent of Banks ("Superintendent") to operate a branch bank in New York City. Petitioners in No. 1595 are five American and foreign insurance companies ("Insurers") which

are creditors of Intra Bank (R. 248),[2] and whose claims are not based on separate transactions with the New York branch of Intra Bank, but, rather, stem primarily from deposits made in various Intra Bank branches throughout the world as conditions precedent to doing insurance business in different countries. (R. 248).

On October 15, 1966, as a result of Intra Bank's suspension of its business in Lebanon and elsewhere, the Superintendent took possession of the business and property of the New York branch of Intra Bank ("IBNY"), and thereafter determined to liquidate the branch.[3] This determination was not challenged by Intra Bank, even though it had a right to do so under the Banking Law of New York, § 607.

Subsequent to this action by the Superintendent, the Insurers instituted in the New York State courts actions against Intra Bank by serving orders of attachment against assets of IBNY then held by the Superintendent (R. 248). Upon the Superintendent's

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[2] The reference "R." is to the record on appeal in the Court of Appeals of New York, copies of which have been filed with the Clerk of this Court.

[3] The liquidation scheme as set out in the Banking Law of New York imposes upon the Superintendent the duty to marshal all of IBNY's assets (§ 618(1)); provides for the filing and proving of preferred claims (§ 620), defined as those claims of depositors and creditors which would constitute an enforceable legal obligation against the local branch of the foreign bank if it were a separate and independent legal entity (§ 606(4)(a)); calls for the payment out of the assets collected of preferred claims (§ 606(4)(a)); and requires remittance of any remaining assets, after payment of costs of administration and liquidation, to the principal office of the foreign banking corporation or to its domiciliary liquidator or receiver (§ 606(4)(b)).

motion, the Supreme Court of New York stayed further proceedings under the attachment orders (R. 255), and directed (R. 255),

> that in the event of liquidation or other reorganization proceedings by the Superintendent the attachment shall stand only as to any excess funds as defined in Banking Law, section 606(4)(b), returned by the Superintendent to * * * [Intra Bank in Beirut].

On July 18, 1967, in response to the Superintendent's Notice under § 620 of the N.Y. Banking Law (R. 49), the United States filed on behalf of the Commodity Credit Corporation ("CCC") a claim in the amount of $21,010,766, plus interest, based on 53 irrevocable letters of credit issued by IBNY for the account of various American exporters in favor of CCC. These letters of credit related to commodities sold by CCC under its Export Credit Sales Program (R. 50). Simultaneous with this filing, the United States asserted a federal priority based on 31 U.S.C. 191 and 15 U.S.C. 714b(e) with respect to its claim. No timely objection was entered by any interested party under § 623 of the N.Y. Banking Law (R. 51); however, on August 9, 1967, the Superintendent rejected the claim (R. 51). The United States formally challenged this rejection in the courts of the State of New York,[4] and in federal court by instituting an independent action.[5] These actions were suspended, pending the outcome of the instant proceedings.

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[4] *United States* v. *Wille, et al.*, Sup. Ct. N.Y., N.Y. Co., Index No. 40361-68.

[5] *United States* v. *Wille, et al.*, S.D.N.Y., 68 Civ. 1434.

On February 1, 1968, the Superintendent and the United States entered into a compromise agreement (R. 62–70), by the terms of which the Superintendent was to accept the previously rejected claim of CCC against assets of IBNY in exchange for which CCC agreed to forego payment of its claim until payments had first been made to all other creditors in the liquidation proceeding whose claims had been accepted or determined to be valid; the Superintendent further agreed to assign to CCC all his right, title and interest in and to various actions seeking to reduce to possession certain assets of Intra Bank to which the Superintendent claimed statutory title.

The Superintendent petitioned the Supreme Court of the State of New York for an approval of the compromise on February 16, 1968 (R. 49–61). An order to show cause was entered the same day (R. 41–45), setting a hearing for March 27, 1968. The objections of Intra Bank and the Insurers were fully heard at this hearing (R. 20, 21–40), and on June 24, 1968, the court entered an order approving in all respects the compromise agreement between the Superintendent and CCC (R. 16–18). The affirmance of that order by the Court of Appeals of the State of New York gives rise to the instant petitions.

While this sequence of events was transpiring in the United States, similar steps were being undertaken against Intra Bank abroad. In Lebanon, following suspension of Intra Bank's operations in October 1966, involuntary bankruptcy proceedings were instituted before the Commercial Court of Beirut,

and on January 4, 1967, Intra Bank was declared a bankrupt as of October 14, 1966. These proceedings were subsequently suspended as a result of passage by the Lebanese Parliament of Law No. 2/67 on January 16, 1967. That Law divested the Commercial Court of jurisdiction over Intra Bank and empowered it to appoint a special "Management Committee" to manage temporarily the affairs of Intra Bank and, absent immediate recovery, to liquidate Intra Bank in an orderly fashion.

On October 11, 1967, the four major creditors of Intra Bank (the Governments of Lebanon, Qatar and Kuwait, and CCC) entered into an agreement with the Management Committee (the "Beirut Agreement"; R. 217–223), providing for Intra Bank's reorganization (R. 219–220). Contemporaneously with the Agreement, these four major creditors and the New York investment banking firm of Kidder Peabody & Co., Inc.—which had proposed the reorganization plan—agreed upon a Protocol to the Agreement (the "Beirut Protocol"; R. 224–230). The essential features of the Protocol were an agreement of principles regarding the formation of a new company (Art. 2, R. 224); agreement of assumption of liabilities through stock ownership (Art. 3(a) and (b), R. 225–226); a reservation of rights by CCC to proceed against Intra Bank's assets in the United States; and a provision that CCC would surrender its shares of stock in the new company to the extent its claim was satisfied out of United States assets (Art. 3(e), R. 226).

As required by Lebanese legislation, the Beirut Agreement, together with the Protocol, was subsequently submitted to the local courts for approval. The Court of First Instance of Beirut, by its judgment of November 4, 1967, unanimously ratified the Beirut Agreement and Protocol (R. 457–461) and, in so doing, expressly rejected the objection (R. 459) that such ratification would enable CCC to obtain "preferential treatment" (R. 460).

ARGUMENT

Under the guise of a Due Process issue, Intra Bank and the Insurers ask this Court to review for a third time whether the New York trial court, in approving the compromise between the Superintendent and CCC, rendered an "informed and independent judgment as to whether [the] proposed compromise is fair and equitable," and "apprised [itself] of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." *Protective Committee* v. *Anderson,* 390 U.S. 414, 424. Assuming *arguendo* that this standard, first enunciated in a case involving "a corporate reorganization under Chapter X of the Bankruptcy Act * * *, 11 U.S.C. §§ 501–676" (*id.* at 418), is applicable in the context of a state liquidation proceeding under the New York Banking Law, the test has been fully satisfied.

Petitioner Intra Bank reasserts here *first,* that CCC's claim against IBNY's assets and its reliance on the federal priority statute presented questions not fully litigated on the merits in the state courts (Pet.

I, 3, 14–18)[6]; *second,* that the record does not conclusively establish Intra Bank's insolvency (Pet. I, 3, 18–19); and *third,* that the compromise agreement violates the Beirut Protocol (Pet. I, 3, 20–21) and disregards a prior Lebanese judgment which is entitled to "faith and credit" (Pet. I, 11). Similarly, the Insurers challenge (Pet. II, 16–25) the trial court's findings that CCC's claim does arise out of New York transactions (App. 38a), and that, for purposes of the proposed compromise agreement with the Superintendent, the record sufficiently establishes the "probability of ultimate success" if CCC's assertion of federal priority under 31 U.S.C. 191 were to go to trial (App. 45a).

Each of these arguments received painstaking attention by the trial court and was found to be without merit; they were briefed extensively and argued in two appellate courts of the State of New York, and again they were rejected. Nothing is said in the petitions to warrant further review.

1. That the New York State courts did not fully litigate the merits of CCC's claim is readily conceded. To have done so would have been both improper and inappropriate. For, as this Court expressly recognized in *Protective Committee* v. *Anderson, supra,* 390 U.S. at 424–425, the very purpose of a compromise agreement is to achieve "the likely rewards of litigation" without subjecting contracting parties to the "complexity, ex-

[6] The reference "Pet. I" is to petition No. 1584, filed in this Court by Intra Bank; the reference "Pet. II" is to petition No. 1595, filed in this Court by the Insurers.

pense, and likely duration of such litigation." It is not the function of the reviewing court to determine conclusively the merits of a compromise,[7] but rather to ascertain "the probability of ultimate success" if the claim were to be fully tried. In essence, the aim is to avoid protracted litigation, not to encourage it.

As pointed out repeatedly by the New York State courts in these proceedings, the compromise agreement here fully meets the "fair and equitable" standard enunciated in *Anderson, supra,* at 424–425. This conclusion is amply supported by the voluminous record in this case. The contention that CCC's claim was "contingent" and thus not provable in New York liquidation proceedings was rejected only after the most extensive review of legal authorities (App. 37a–45a). Similarly, the question of CCC's federal priority under 31 U.S.C. 191 underwent careful scrutiny (App. 45a–52a) before the court concluded that the "probability of ultimate success" on trial (App. 45a) had been satisfactorily demonstrated. And full consideration was given to the equities of the situation presented, as evidenced by the following statement of the trial court (App. 38a):

> The claim of CCC does not depend solely on its rights as holder of the letters of credit. It has a claim for restitution, based on the fact that Intra NY has procured money "under such circumstances that in equity and good conscience [it] ought not to retain it" [citing *Pink* v. *Title Guarantee & Trust Co.* 274 N.Y.

[7] Clearly, if a court were required to decide the "fairness" of a compromise on the basis of a full trial on the merits, all impetus to compromise would disappear.

> 167], and which Intra NY "is obliged by natural justice and equity to refund" [citing *Bayne* v. *United States*, 93 U.S. 642]. That debt becomes subject to CCC's statutory priority (see *Bayne*). CCC may sue directly on the debt, without recourse to the letters of credit. * * *

In these circumstances, it is difficult to imagine what more the court below could have done, short of a full trial on the merits, to determine the fairness and reasonableness of the proposed compromise. Indeed, the petitions here, directed almost exclusively to extensive reargument of the merits, appear to concede as much.

2. The claim by Intra Bank that there is no support below for a finding that it was insolvent (Pet. I, 19) is equally without merit. The record contains a square admission by the court-appointed Management Committee that as of October 1966 the capital of Intra Bank was "totally lost as proved by the report of the experts in general and by the report of Cooper Bros. in particular" (R. 219). That admission was expressly ratified by the Court of First Instance of Beirut (R. 461). Moreover, the Beirut Agreement and Protocol (R. 217–230)—designed to save Intra Bank from immediate bankruptcy liquidation—were entered into one-half year before the Superintendent sought court approval of the compromise agreement.

By any reasonable standard, the proof in the record is more than ample to demonstrate insolvency. Suspension of Intra Bank's operations in October 1966, cessation of its payments, and the Superintendent's unchallenged takeover and liquidation of IBNY's assets in New York are all clear indicators of Intra

Bank's inability to pay existing debts. See *Cunningham* v. *Norton*, 125 U.S. 77, 90.

3. Equally devoid of substance is the claim that CCC's compromise with the Superintendent violates the Beirut Protocol (Pet. I, 20–21). Article 3(e) of that document states expressly that, "This Protocol *does not prevent CCC from pursuing its claims under United States laws against Intra Bank assets * * * in the United States*" (emphasis added), and provides for the surrender by CCC of shares in the new company "to adjust for proceeds that it may receive in implementation of a Court decision in the United States" (R. 226). Accordingly, this belated argument[8] finds no support in the express language of the Beirut Protocol. Similarly, there is no merit to the further contention that approval of the compromise below somehow failed to respect the judgment of the Court of First Instance of Beirut (Pet. I, II). The Lebanese tribunal expressly held, in response to a challenge to the italicized language quoted above, that (R. 460):

> The privileged treatment enjoyed by Creditors abroad in collecting their debts has not been granted to them by the agreement. They enjoyed this privilege by the laws of their country

[8] None of the opposing papers filed by Intra Bank at the hearing on March 27, 1968, made any mention of CCC's alleged agreement not to compromise any litigation in the United States. Petitioner's answer to the Superintendent's moving papers raised four defenses, one alleging that the petition fails to state a cause of action, and the others attacking on various theories the validity of CCC's claim (R. 95–98). One would expect that if an express agreement against compromise now claimed by the petitioner did in fact exist, petitioner would have immediately challenged the proposed agreement of compromise on that basis.

and the agreement did not, therefore, deprive them (the other Creditors) of any of their rights.

On the basis of the entire record, it is clear the New York courts rendered an informed and independent judgment as to whether the agreement of compromise fairly and equitably resolves CCC's claim under the New York Banking Law against assets of Intra Bank's branch bank in New York. The areas of disagreement with the conclusions drawn by the courts below, as reflected in petitions Nos. 1584 and 1595, raise no constitutional issues and present no occasion for this Court to review the voluminous record for a third time.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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JOHN F. DAVIS, CLE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1584

INTRA BANK, S.A.,

Petitioner,

vs.

FRANK WILLE, Superintendent of Banks of the State of New York, and United States of America,

Respondents.

PETITIONER'S REPLY BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1969

No. 1584

INTRA BANK, S.A.,

Petitioner,

vs.

FRANK WILLE, Superintendent of Banks of the State of New York, and United States of America,

Respondents.

PETITIONER'S REPLY BRIEF

Preliminary*

The answering briefs of the Superintendent of Banks ("Superintendent") and of the United States ("CCC") fail to meet the issues raised in the petition. The central issue here is whether the procedures utilized by the New York Courts in confirming the settlement between the Superintendent and the CCC afforded due process to petitioner, Intra Bank S.A. ("Intra").

The Superintendent concedes the existence of this federal question (Br. p. 9). In effect the Superintendent by

* Figures in parentheses refer to pages in printed record on appeal to New York Court of Appeals unless otherwise indicated.

his silence appears to concede that this federal question is an important one.

The Superintendent's resistance to the petition seems to be

(1) the New York courts were adequately informed despite the failure to hold an evidentiary hearing because Special Term said so (Br. p. 10); and

(2) two of the four basic issues referred to in the petition herein may be disposed of without additional evidence (Br. p. 13).

I

Special Term was misinformed and uninformed.

In its original opinion (Appendix A, p. 30a), Special Term said that it had apprised itself of all necessary facts. No such statement appears in its opinion on reargument (Appendix A, pp. 15a-25a).

The accuracy of Special Term's statement in its original opinion can be gauged by the obvious errors and omissions of fact therein, to wit:

1. CCC was not aware that Branch would obtain the funds under the letters of credit as soon as the commodities were shipped (Appendix A, p. 39a). In fact, CCC was fully aware (470-1, 445).

2. The moneys received by Branch were transferred to Beirut without the knowledge or consent of CCC (Appendix A, p. 39a). In fact, CCC was fully aware of the transfer and consented thereto (470-1, 445).

3. Intra, in Beirut, received such moneys for its own account (Appendix A, pp. 35a-9a). In fact, they were received by Intra in a blocked account in the name of the Lebanese importer (443-4).

4. The 36-month credit provision of the letters of credit was invalid (Appendix A, p. 39a). CCC expressly conceded to the contrary (471).

5. "The result reached herein conforms to one's natural sense of fairness and equity. There can be little question but that, as between CCC on the one hand, and shareholders of Intra N. Y. and creditors who claim in subordination to them on the other hand, the claim of CCC is superior." (Appendix A, p. 53a). Intra was reorganized in Lebanon (447, 217-30, 457-61) and the controversy is between creditors of the New York Branch and all creditors.

6. There is no finding as to the value of what CCC is receiving. CCC will receive all assets not needed for the payment of other creditors of Branch[1]. There is no evidence as to the value of all such assets.

II

Issues as to the effect of the Beirut Protocol should be resolved by a plenary hearing.

The CCC has completely misconceived the thrust of the petition (Br. pp. 8-9). The Superintendent correctly conceives the petition (Br. p. 13), but intimates that two of the four issues which petitioner says require additional evidence can be adequately determined on this record.

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[1] The Superintendent candidly admits that the "essential feature" of the compromise is simply that it enables New York creditors to be paid in full (Br. p. 4). At no point in this proceeding has the Superintendent given any recognition whatever to the equitable right of other creditors to be protected against abandonment by the Superintendent of the remaining New York assets to the CCC regardless of the merits of its claims.

The Superintendent contends that Intra was permitted to put into evidence whatever evidence it had to support its interpretation of the Beirut Protocol (Br. p. 13). There is no basis whatsoever for the contention that Intra exhausted all available evidence with respect to the protocol. Sufficient evidence was introduced by Intra to establish prima facie that the Beirut Protocol barred the compromise.

It is important to note that Intra's rights under the Beirut Protocol are not, and could not be, a subject of compromise between the Superintendent and the CCC. Intra's claim based upon those rights, having been duly raised as an equitable defense in this proceeding,[2] must be adjudicated. Regardless of the degree of certitude which may or may not be required for approval of a compromise, due process requires a plenary evidentiary hearing for resolution of issues of fact involved in this defense.

Conclusion

At stake here is the important federal question of procedural due process. The New York Courts have introduced far-reaching innovations in the law respecting settlement of claims.

The rights of foreign governments vis-a-vis the CCC have been determined without any proper judicial trial respecting the merits thereof. Petitioner does not contend that in approving compromises the Courts must weigh the merits of the claim with the nicety of an apothecary's scale. Petitioner contends, however, that there must be an adequate basis for any weighting and that basis is not pres-

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[2] The Superintendent's suggestion (Br. p. 13) that Intra's only recourse is an action for damages against the CCC is so plainly contrary to basic equitable principles as to require no comment.

ent here and procedures utilized by the New York Courts were not adequate or proper to accomplish any fair weighing at all.

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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